

PUBLIC VERSION

**UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.**

Before The Commission

In the Matter of

**CERTAIN RUBBER
ANTIDEGRADANTS, COMPONENTS
THEREOF, AND PRODUCTS
CONTAINING SAME**

Investigation No. 337-TA-533

**RESPONSE OF THE OFFICE OF UNFAIR IMPORT INVESTIGATIONS
TO PETITIONS FOR REVIEW OF FINAL INITIAL DETERMINATION**

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I. INTRODUCTION

On February 17, 2006, the Administrative Law Judge issued his final initial determination (“ID”), wherein he found a violation of Section 337 by Respondents Sinorgchem Co., Shandong (“Sinorgchem”) and Sovereign Chemical Company (“Sovereign”), and found no violation by Respondent Korea Kumho Petrochemical Co., Ltd. (“KKPC”). ID at 138. The ID’s finding of violation is based on its determination that Sinorgchem’s accused process infringes claims 30 and 61 of U.S. Patent 5,117,063 (“the ‘063 patent”) and claims 7 and 11 of U.S. Patent 5,608,111 (“the ‘111 patent”).¹ ID at 97, 138. The ID also determined that Complainant Flexsys America L.P. (“Flexsys”) demonstrated that a domestic industry exists with respect to the patents at issue.²

¹ Sovereign’s alleged violation is premised on the fact that it imports into and sells in the United States infringing 6PPD made by Sinorgchem. ID at 102.

² The domestic activities of Flexsys had previously been determined to satisfy the economic criterion of Section 337. Order No. 28, October 13, 2005.

ID at 122. The ID further determined that Respondents had not demonstrated that any of the claims were invalid as obvious under § 103 or indefinite under § 112, ¶ 2. ID at 113, 118-19. Finally, the ID recommended that if the Commission finds a violation, a limited exclusion order should issue against Sinorgchem and Sovereign excluding 4-ADPA and 6PPD made by Sinorgchem, and that a bond should not be imposed during the Presidential review period. ID at 131, 134.

On March 3, 2006, the Office of Unfair Import Investigations (“OUII”), Sinorgchem and Sovereign (“Sinorgchem”), and Flexsys all filed petitions for review. KKPC filed a “contingent” petition for review.³ OUII seeks review of (1) the ID’s construction of the term “controlled amount of protic material,” (2) its determination of infringement based on such construction, and (3) its determination that such construction satisfies the definiteness requirements of section 112, ¶ 2.⁴ Sinorgchem seeks review of the three above issues upon which OUII seeks review, as well as the ID’s determination that the asserted claims are not invalid as obvious under § 103. KKPC seeks review of the four issues upon which Sinorgchem seeks review, as well as the ID’s determination that KKPC’s P1 and P2 processes are not within the scope of this investigation and the ID’s determination that KKPC does not have a license under the patents at issue. Flexsys seeks review of the ID’s determination that KKPC does not directly infringe either of the claims asserted against it in the Complaint - - claim 61 of the ‘063 patent and claim 11 of the ‘111 patent

³ Under the Commission’s Rules, a “contingent” petition is deemed to be a “petition.” See Rule 210.43(b)(3).

⁴ OUII also seeks review of the ID’s factual findings relating to the Wohl references regarding the first two elements of the claims at issue. OUII Petition at 2, n.3, 28, n.18.

- - and also seeks review of the ID's failure to find that KKPC violated Section 337 by virtue of its exportation of 6PPD, irrespective of whether KKPC infringes any of the claims asserted against it in the Complaint.

In sum, OUII supports Sinorgchem's and KKPC's petitions insofar as they seek review of the ID's construction of the limitation "controlled amount of protic material," the ID's determination that Sinorgchem infringes, and the ID's determination that the asserted claims are definite. OUII also supports Sinorgchem's and KKPC's petitions for review of the ID's obviousness determination to the extent that they seek review of the ID's factual findings regarding the Wohl experiments. *See* Sinorgchem's Petition at 41-46; *see also* Note 4, *supra*. OUII has already briefed those issues in its Petition for Review and, therefore, will not address them herein. With the exception of the issues identified above, OUII opposes the other grounds of the parties' Petitions for Review.

II. STANDARD OF REVIEW

Pursuant to Commission Rule 210.43(b)(1), a party seeking review must specify one or more of the following grounds upon which review of the initial determination is sought:

- (i) that a finding or conclusion of material fact is clearly erroneous;
- (ii) that a legal conclusion is erroneous, without governing precedent, rule or law, or constitutes an abuse of discretion; or
- (iii) that the determination is one affecting Commission policy.

Commission Rule 210.43(d)(2) provides that the Commission will grant a petition and order review "if it appears that an error or abuse of the type described in paragraph (b)(1) of this section

is present or if the petition raises a policy matter connected with the initial determination, which the Commission thinks it necessary or appropriate to address.” 19 C.F.R. § 210.43(d)(2).

With the exception of the ID’s claim construction, its determination that Sinorgchem’s process infringes, and its determination that the asserted claims are definite, none of the private parties has demonstrated that any of the ID’s legal determinations is erroneous or that any of its factual determinations are clearly erroneous. Therefore, only a partial review of the ID is warranted.

III. FLEXSYS’ PETITION

Flexsys argues that the ID erred by failing to determine that KKPC violated Section 337 by directly infringing asserted claim 61 of the ‘063 patent and claim 11 of the ‘111 patent. Flexsys contends that Section 337(a)(B)(ii) refers to “articles” protected by a valid patent and that actions under this section are *in rem* in nature. Based on the foregoing, Flexsys argues that a violation should be found if the articles are made by the patented process, irrespective of whether two entities collectively practice the process. Flexsys Petition at 7-8, 16, 26-27. Flexsys also contends that KKPC should have been determined to have violated Section 337(a)(B)(ii) because the 6PPD that it exports to the United States was made by means of a process covered by claim 30 of the ‘063 patent and claim 11 of the ‘111 patent.⁵ Flexsys Petition at 28 *et seq.*

⁵ However, it is critical to note that in its Complaint, Flexsys expressly limited its infringement allegations against KKPC to infringement of claim 61 of the ‘063 patent and claim 11 of the ‘111 patent. *See* Complaint, ¶¶ 47-52, pp. 15-16. Flexsys has not amended, or sought to amend, its complaint to allege that KKPC infringes process claim 30 of the ‘063 patent or
(continued...)

A. Flexsys Has Failed to Demonstrate that the ID Erred In Determining that KKPC Does Not Directly Infringe Asserted Claim 61 of the ‘063 Patent and Claim 11 of the ‘111 Patent

In support of the above contention, Flexsys relies extensively on the district court’s decision in *E.I. Dupont De Nemours & Co. v. Monsanto Co.*, 903 F.Supp. 680 (D. Del. 1995), *aff’d* on other grounds (invalidity based on obviousness), 92 F.3d 1208 (Fed. Cir. 1996) (unpublished opinion) (“*DuPont*”). See Flexsys’ Petition at 22-27. However, as shown below, the *DuPont* decision does not support Flexsys’ contentions. Indeed, application of the rationale of the *DuPont* decision to the facts of the instant investigation would lead to a finding that KKPC does *not* infringe either claim 61 of the ‘063 patent or claim 11 of the ‘111 patent because the two defendants in *DuPont* acted in concert.

The ID rejected Flexsys’ argument that KKPC’s relationship with Sinorgchem supported a determination that KKPC infringes. The ID found that Flexsys failed to demonstrate that the relationship between Sinorgchem and KKPC was anything other than that of an arm’s length buyer/seller relationship. ID at 104-05. In contrast, the court in *DuPont* determined that

⁵ (...continued)
process claim 7 of the ‘111 patent. Therefore, KKPC has never been alleged to have infringed claim 30 of the ‘063 patent or claim 7 of the ‘111 patent. Interestingly, OUII notes that Flexsys moved successfully to *preclude* consideration of evidence relating to KKPC’s P1 and P2 processes for making 4-ADPA, which compound is the end-product of the processes covered by claim 30 of the ‘063 and claim 7 of the ‘111 patents. In its motions to preclude such evidence, Flexsys argued, *inter alia*, that the allegations in its Complaint governed, and that KKPC was *not* accused of infringing claim 30 of the ‘063 or claim 7 of the ‘111 patents.

Moreover, Flexsys failed to assert allegations of infringement of claims 30 and 7 against KKPC in its prehearing statement as required by the Ground Rule 9(v). In view of the foregoing, Flexsys’ contentions regarding KKPC’s alleged infringement of claim 30 of the ‘063 patent and claim 7 of the ‘111 patent should not be addressed.

Monsanto and CaMac were “working in concert” and that Monsanto, the entity that sold the final product, directly infringed the asserted process claim. Monsanto entered into a toll manufacturing contract with CaMac wherein Monsanto manufactured a copolymer, thereby practicing the first element, and CaMac produced the final product, thereby practicing the final elements. CaMac shipped the final product back to Monsanto for its sale of the resultant product under Monsanto’s name. *DuPont*, 903 F.Supp. at 733. Thus, CaMac served as a “contract” manufacturer of the product at issue for Monsanto, in essence Monsanto’s alter ego. Therefore, the relationship between CaMac and Monsanto in *DuPont* was not one of “an ordinary buyer and seller” as is present herein. Here, Sinorgchem produces 4-ADPA and 6PPD, each of which is offered for sale to any entity willing to pay Sinorgchem’s asking price. Similarly, KKPC purchases 4-ADPA for use as a raw material in its production of 6PPD, and KKPC has purchased 4-ADPA from many sources, only one of which is Sinorgchem. *See* ID at 103-05.

Moreover, Flexsys’ reliance on the fact that Monsanto and CaMac did not share information does not support its conclusion that KKPC is an infringer. Unlike the arm’s length relationship between Sinorgchem and KKPC here, as noted above, a toll manufacturing agreement existed between Monsanto and CaMac. CaMac practiced the elements necessary to produce the final product for Monsanto in accordance with its toll manufacturing agreement. Under these circumstances, the fact that Monsanto and CaMac did not share information (Flexsys Petition at 25) is irrelevant to any issue in this investigation.

Finally, Flexsys’ contention that “[i]n the present case the facts for liability are even more compelling Here KKPC not only imports the final product, which the ALJ found is made by

the claimed process, it also performs the final step of that claimed process to obtain that product.” Flexsys Petition at 26. Flexsys’ contention is without merit. As discussed above, CaMac made the product for Monsanto pursuant to a toll manufacturing agreement with Monsanto. Thus, the court’s determination that Monsanto was liable as a direct infringer is unremarkable since all of CaMac’s actions were directly attributable to Monsanto. In contrast, Flexsys does not contend (and the record does not contain any evidence) that Sinorgchem makes 4-ADPA specifically for KKPC, or that KKPC has or had any say in the manner in which Sinorgchem makes 4-ADPA, or that KKPC cares. *See, e.g.*, ID at 102-05. Under these circumstances, OUII submits that the *DuPont* decision does not support Flexsys’ contentions.

B. Flexsys Has Failed to Demonstrate that the ID Erred By Determining that KKPC Has Not “Violated” Section 337(a)(1)(B)(ii)

Flexsys contends that the ID erred by failing to determine that KKPC violated Section 337(a)(1)(B)(ii) because KKPC imported 6PPD covered by claim 30 of the ‘063 patent and claim 7 of the ‘111 patent. Flexsys Petition at 29-30. OUII submits that the ID did not err. Indeed, consideration of such an assertion would have been erroneous on two grounds. First, as noted in footnote 5 *supra*, Flexsys did *not* assert claim 30 of the ‘063 patent or claim 7 of the ‘111 patent against KKPC in its Complaint. *See* Verified Complaint, ¶¶ 47-52, pp. 15-16, and discussion in footnote 5, *supra*. Moreover, the Complaint was not amended to assert that KKPC infringes either claim 30 of the ‘063 patent or claim 7 of the ‘111 patent. Thus, infringement of claim 30 of the ‘063 patent and claim 7 of the ‘111 patent by KKPC is *not* within the scope of

this investigation. Therefore, consideration of these *new* infringement contentions would be erroneous.⁶

Second, Flexsys did *not* raise these infringement allegations against KKPC in its pre-hearing brief, in direct contravention of Ground Rule 9(v) (“Any contention not set forth in detail as required herein shall be deemed abandoned, or withdrawn, except for contentions for which a party is not aware and could not be aware in the exercise of reasonable diligence at the time of the filing of the pre-hearing statement.”). Rather, these contentions were *first* raised by Flexsys in its *post* hearing *reply* brief. *See* Flexsys Post Hearing Reply Brief at 46-48; ID at 102. Flexsys did *not* provide *any* justification for its failure to raise these contentions in its pre-hearing brief as required by Ground Rule 9(v).

In sum, Flexsys’ Complaint does not allege that KKPC infringes either claim 30 of the ‘063 patent or claim 7 of the ‘111 patent, Flexsys did not and has not moved to amend the complaint to assert these claims against KKPC,⁷ and Flexsys failed to assert either of these claims against KKPC in its prehearing statement as required by Ground Rule 9(v). In view of the foregoing, OUII submits that consideration of Flexsys’ *new* infringement allegations against KKPC on the merits would constitute error.

⁶ OUII notes that, in its submission to preclude consideration of evidence relating to KKPC’s P1 and P2 processes for producing 4-ADPA, Flexsys argued that its allegations against KKPC in the Complaint *control*. In view of the foregoing, Flexsys’ complete disregard of its own prior contentions by asserting these *new* infringement allegations against KKPC appears to be disingenuous.

⁷ OUII submits that the time within which to file such a motion expired no later than the commencement of the hearing in this matter.

As demonstrated above, Flexsys has not shown that any of the ID's determinations concerning KKPC's non-infringement is either factually or legally erroneous. Therefore, Flexsys has failed to demonstrate that any of these determinations merits Commission review.

IV. SINORGCHEM'S PETITION

A. OUII Agrees with Sinorgchem's Contentions that the ID Erred With Respect to Claim Construction, Infringement by Sinorgchem and Indefiniteness

As discussed in Section I above, and in OUII's Petition for Review, OUII agrees with Sinorgchem that the ID's determinations with respect to claim construction, infringement, and indefiniteness constitute reversible error. OUII also agrees with Sinorgchem's contentions that the ID's factual findings regarding the scope and content of the Wohl disclosures in the validity section are clearly erroneous, and are inconsistent with the factual findings in the introductory and claim construction sections of the ID. *See* Section I and note 4, *supra*.

B. Sinorgchem Has Failed to Demonstrate Error in Connection with the ID's Determination that One of Ordinary Skill in the Art Would Not Have Been Motivated to Use Wohl's Disclosures

The ID determined that one of ordinary skill in the art would not be motivated to use Wohl's disclosures as a starting point to make 4-ADPA "because it primarily taught the production of phenazine and other ortho-substituted products, and because it produced only 3% of p-nitrosodiphenylamine in what Wohl referred to as a 'side reaction.'" ID at 111.⁸ Sinorgchem contends that the ID erred by "ignoring substantial contemporary evidence of

⁸ As previously noted, OUII agrees with Sinorgchem's contention that many of the ID's factual findings regarding Wohl's disclosures are clearly erroneous.

motivation to combine.” Sinorgchem Petition at 37. Specifically, Sinorgchem erroneously argues that the ID’s failure to find that the chemical industry’s drive to minimize chlorine waste began in earnest in the late 1980s provides “compelling evidence of motivation to combine that the ALJ improperly ignored in his determination on obviousness.” *Id.* at 38. Sinorgchem also contends that the ID erred by ignoring the testimony of Respondents’ expert witness that those of ordinary skill in the art would not be dissuaded by low yields or that the reaction was characterized as being a side-reaction. *Id.* at 39-40.

The ID’s factual determinations were made after consideration of arguments presented by all of the parties in this investigation. ID at 107, 110-11. In OUII’s view, none of Sinorgchem’s contentions demonstrates that any of the ID’s factual determinations relating to motivation to combine are *clearly* erroneous, thereby meriting review.

V. KKPC’S PETITION

OUII will limit its response to the issues that are unique to KKPC’s petition since the other issues have been previously addressed in connection with OUII’s response to Sinorgchem’s petition in Section IV above.

A. KKPC Has Failed to Demonstrate that the ID’s Determination Not to Consider Its P1 and P2 Processes Warrants Review

KKPC asserts that the ID’s determination to grant Flexsys’ motion to strike the evidence it presented relating to its P1 and P2 processes for the production of 4-ADPA constitutes reversible error. KKPC Petition at 6-9. KKPC contends that the ID’s failure to consider these processes is contrary to the Commission’s policy of allowing Respondents to present new designs

or processes at the hearing for a determination of infringement. *Id.* at 8-9. Despite the foregoing, however, KKPC does not, and OUII submits cannot, show that the ID's determination to exclude the evidence in a manner consistent with the Commission's statements in *Certain Flash Memory Circuits and Products Containing Same*, Inv. No. 337-TA-382 (1997) constitutes reversible error.

Based on the foregoing, KKPC's request for review of this issue should be denied.

B. KKPC Has Also Failed to Demonstrate that Review of the ID is Warranted Based on the ID's Determination that the Issue of Whether KKPC Is Licensed to Practice the Alkylation Step Is Irrelevant

KKPC contends that the ID erred when it determined that the issue of whether KKPC has a license to practice the alkylation step of claim 61 of the '063 patent and claim 11 of the '111 patent is irrelevant. KKPC Petition at 10. The ID did not address this issue, stating that it was irrelevant because, *inter alia*, KKPC was not in violation. ID at 130, n.40.⁹ In light of the ID's determination that KKPC has not violated Section 337, OUII does not believe that its failure to decide this issue regarding practice of the alkylation step constitutes reversible error.

C. KKPC Failed to Demonstrate that the ID Erred in Determining That KKPC Is Not Licensed Under the Patents at Issue

KKPC contends that the ID committed numerous errors when construing the terms of the various contracts associated with the joint-venture between Kumho and Monsanto, including, *inter alia*, failing to determine that the PPD2 process is an "improvement" under the contracts;

⁹ Below, OUII agreed with KKPC's contention that, even if KKPC were not licensed under the patents at issue, KKPC's rights to transform 4-ADPA from any source into 6PPD using the processes that it had used during the life of the joint-venture agreement will continue as long as it uses those processes. Commission Investigative Staff's Post Hearing Reply Brief at 15-16. However, the ID's determination that KKPC is not in violation moots this issue.

and determining that the PPD2 process was “commercialized” during the term of the agreements. KKPC Petition at 11-14. KKPC relies in large part on an alleged course of conduct between the parties to the joint venture agreement based on testimonial evidence and an overly broad definition of the term “commercialize” in support of these contentions. *Id.* at 13. OUII submits that KKPC has not demonstrated, nor can it demonstrate, that the ID erred when rendering any of the challenged determinations.

As the ID found, even if KKPC had succeeded to KMI’s rights under the TALA, the TALA *only* provides rights to Monsanto’s commercial process for making 4-ADPA (PNCB) that existed *at the time of the agreement*, and improvements to such process, *i.e.*, the prior art “PPD-1” process and *not* to the PPD2 process as KKPC asserts.¹⁰ ID at 124-27; RX506, § 4.1 at KKPC-ITC-04756 (Improvements, TALA); § 2.08(b) at KKPC-ITC-04778 (Technical appendix); Crowley, Tr. 2219-20, 2225. Therefore, KMI did not expressly have rights to “improvements” that consist of *replacement* of the existing commercialized technology by a totally new technology such as the PPD2 process at issue. ID at 128.

Second, even if technological developments such as the PPD-2 technology were encompassed within the joint-venture agreements, KMI would only have rights to such technology if such technology had been commercialized by Monsanto or an affiliate thereof prior to October 31, 1997. The evidence of record demonstrates that the PPD-2 process was

¹⁰ See also §1.11 -MONSANTO 4-ADPA PROCESSES shall mean *existing Monsanto commercial processes* and processes currently being developed by MONSANTO and/or its AFFILIATES (as hereinafter defined) for use in the commercial manufacture of NEW 4-ADPA. RX506, § 1.11 at KKPC-ITC-04747 (emphasis added).

commercialized *subsequent* to the relevant date, *i.e.*, production of products using the PPD2 process for sale. Rains, Tr. 2194; CX202 at FA070136; ID at 129.

Under KKPC's expansive definition of the term "commercialize," almost any activity taken in connection with the PPD2 process, including the initial research and development activities, would satisfy the definition: "to apply methods of business for profit." *See* KKPC Petition at 13. OUII submits that application of such an expansive definition in the context of a contract between two sophisticated businesses such as Kumho and Monsanto would be unreasonable. For example, the presence of the term "commercial" in various provisions in the agreements appears to associate the term "commercial" with actual use in the production of products for sale. *See, e.g.*, RX 507, at FA018261 ¶ 1.04, "Existing Products," "manufactured commercially."

Moreover, OUII submits that KKPC has not demonstrated that the ID erred by determining that the PPD2 product is not an "improvement" of Monsanto's pre-existing process under the definition provided in the relevant documents, which expressly links the word "improvement" to *changes to the PPD1 process*, rather than a total change of process, such as changing from the PPD1 process to the PPD2 process. *See, e.g.*, RX506, § 4.1 at KKPC-ITC-04756 (Improvements, TALA); § 2.08(b) at KKPC-ITC-04778 (Technical appendix); *see also* § 1.11 -MONSANTO 4-ADPA PROCESSES shall mean existing Monsanto commercial processes and processes currently being developed by MONSANTO and/or its AFFILIATES (as hereinafter defined) for use in the commercial manufacture of NEW 4-ADPA. RX506, § 1.11 at KKPC-ITC-04747.

D. KKPC Has Failed to Demonstrate that the ID Erred in Determining that Promissory Estoppel Does Not Apply Warrants Review

KKPC asserts that the record contains a number of undisputed facts that support its position. These “undisputed” facts include alleged assurances by Monsanto that induced KMI to refrain from rebuilding its 4-ADPA plant and to rely upon Monsanto “as its primary source of 4-ADPA, and as a *source of PPD2 technology*.” KKPC Petition at 14 (emphasis added). In OUII’s view, the record does not demonstrate that KKPC’s reliance, if any, upon Monsanto’s assurances “as a source of PPD2 technology” was justified. In this regard, OUII notes that most of the proposed findings KKPC cites in support of these contentions are to the testimony of Mr. Lim, a KKPC employee, and *not* on contemporaneous documentation.

In view of the foregoing, OUII submits that KKPC has not demonstrated that the ID erred by determining that KKPC had not established its licensing and estoppel defenses.

VI. CONCLUSION

For the reasons set forth above (and in OUII's petition), partial review of the ID is warranted.

Respectfully submitted,

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PUBLIC CERTIFICATE OF SERVICE

I, Juan Cockburn, hereby certify that on March 22, 2006 copies of the foregoing **RESPONSE OF THE OFFICE OF UNFAIR IMPORT INVESTIGATIONS TO PETITIONS FOR REVIEW OF FINAL INITIAL DETERMINATION (*PUBLIC VERSION*)** were served by hand upon Administrative Law Judge Paul J. Luckern (three copies) and upon the following parties by electronic mail.

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